

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: February 20, 1996

TO : Elizabeth Kinney, Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: K & S Testing & Engineering, Inc.
Case 13-CA-33843

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This Section 8(a)(5) case was submitted for advice on whether the Employer unlawfully refused to supply the Union upon request with the presumptively relevant information of employee home addresses because the Employer allegedly reasonably feared that the Union would use that information to harass crossover employees at their homes.

In March 1995, the Union called an unfair labor practice strike and the Employer hired strike replacements. In October, the strike ended and the Employer reinstated the strikers. In the interim in July, the Employer had filed a Section 8(b)(1)(A) charge alleging various acts of Union misconduct.

As a result of the investigation of that charge, the Region found violations of picket line misconduct at the Employer's plant, including various threats to crossovers and the placing of nails in the plant driveway. The Region dismissed all the allegations of Union violence assertedly directed against employees in their homes. The Employer did not appeal the dismissed allegations of violence at employee homes.

The evidence of Union alleged misconduct at employee homes adduced in the prior 8(b)(1)(A) case involved several employees who did not report to the Employer's plant and instead reported directly to an Employer jobsite. The Union parked one or more cars in the morning in front of these employees' homes. When the employees left for work, the Union attempted to follow the employees to their assigned jobsites to be able to picket the Employer's presence at those sites. Several employees made serious and often successful efforts to evade the Union's attempts at following them. This resulted in the Union's sometimes

parking two or more cars in front of their homes, all pointed in different directions so that the employees could be followed regardless of which of several directions they took.

At least three employees called the police and attempted to get the Union agents arrested for "stalking". One employee successfully obtained a state court temporary restraining order. Regarding that particular employee, the Union offered to cease all efforts to follow him from in front of his home in the morning if the employee would merely provide his job site destination, so the Union could simply meet him there. Both the Employer and the employee refused to provide that information to the Union.

In August 1995, the Union requested the names, addresses, wage rates and other information about all unit employees. The Employer provided all the information except the home addresses. The Employer also notified all employees that it was not providing home addresses to the Union and that employees could provide that information themselves if they wished. The Employer did not attempt to solicit any assurances from the Union that it would not harass the employees if the home addresses were provided. In November, the Union filed the instant charge containing, inter alia, the allegation of an unlawful refusal to provide the home addresses.¹

We conclude, in agreement with the Region, that the Employer unlawfully refused to furnish the requested information because it had insufficient evidence of a clear and present danger that the Union would use the information to harass the employees.

In Chicago Tribune Co., 303 NLRB 682 (1991), there was evidence of strike violence on the union's picket line at the employer's struck facility. Some 40-45 employees were lawfully disciplined for misconduct, and 5-6 employees were

¹ The Region has found merit to other allegations including the issuance of one 8(a)(1) threat, one 8(a)(3) discharge and one 8(a)(5) unilateral change. Dismissed allegations include the imposition of more onerous work conditions, an alleged unlawful discharge of a striker, and an alleged unlawful refusal to supply information concerning another location.

discharged. In addition, employer supervisors were harassed and threatened not only at work, but also at their homes. Supervisors had their homes and property vandalized, and one supervisor had his garage burned, although no evidence of union responsibility was ever uncovered. The information dispute arose when the Union requested the names of permanent replacement employees after the employer had stated that there were no vacancies in a particular department as a result of the hiring of permanent replacements. The employer refused to supply the requested names of permanent replacements because of the violence committed against the supervisors.

The Board found a Section 8(a)(5) violation in reliance upon its well settled test requiring the providing of that information unless the Employer can show "a clear and present danger" that the union will use the information to harm or harass the employees.² The Board found that there was no "clear and present danger" of union violence at the homes of the replacement employees, i.e., that the violence against the supervisors' homes and against the employees at the plant picket line was insufficient to show a danger for employees.³

The Seventh Circuit Court of Appeals denied enforcement noting initially that the Board's standard of "clear and present danger" placed on the employer the virtually insurmountable burden of proving that the union would use the information to harass employees.⁴ In any event, the Court particularly relied upon the fact that the employer in that case had offered to supply the employee names to third parties.⁵ The Court concluded that "the

² The ALJ framed the test as requiring an employer showing of union "misuse". The Board disavowed that formulation of its test. Id. at note 2.

³ Member Raudabaugh did not pass on the Board's "clear and present danger" standard and found a violation even if a lesser standard were applied. Id at 2.

⁴ 965 F.2d 244, 140 LRRM 2516 (1992).

⁵ The employer had offered to either (1) supply the names to an independent accounting firm to verify employment; or (2)

decisive consideration is that, as the administrative law judge acknowledged, every legitimate need of the union for the list of names would have been met by either of the alternatives offered by the company." Id at 140 LRRM 2518 (emphasis in original). It thus appears that the Seventh Circuit, which had previously approved the Board's "clear and present danger" formulation,⁶ either misconstrued the Board's test⁷ or simply applied it to find no violation.⁸

We conclude, in agreement with the Region, that the Employer under extant Board cases unlawfully failed to provide this presumptively relevant information because it failed to show a clear and present danger of harm to employees.

First, it seems clear that the only evidence of any union violence in this case occurred at the plant and involved a few threats on the picket line and some nails in the driveway. There is no evidence whatsoever of any Union violence at the homes of the employees. This lack of evidence is particularly telling here where the Union already knew the home addresses of several employees. Thus, the Union had already placed Union agents at these addresses, and yet committed no violence and only sought to follow these employees to their job site.

Finally, we also note that even under the reasoning of the Seventh Circuit's decision, the Employer here not only offered no reasonable alternatives which would have satisfied the Union's legitimate needs, but actually

supply the union with the birthdates and partial social security numbers of the employees.

⁶ See NLRB v. Illinois-American Water Co., 933 F.2d 1368 (7th Cir. 1991).

⁷ The Board's test does not require a showing of a clear and present of union misuse, but rather a showing of clear and present danger of harm to the employees.

⁸ The Court may have simply concluded that the union violence at the supervisors' homes fulfilled the necessary showing.

refused to provide alternatives, i.e., refused to tell the Union where its employees would be working. In sum, the Region should proceed with the allegation of an unlawful refusal to provide this presumptively relevant information.

B.J.K.